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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 KEVIN PARK,
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13 vs. Plaintiff,
14 WEBLOYALTY.COM, INC.,
15 Defendant.
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CASE NO. 12cv1380-LAB (JMA)
**ORDER DENYING APPLICATION
FOR LEAVE TO AMEND; AND
ORDER OF DISMISSAL**

17 On September 29, 2014, the Court dismissed Plaintiff Kevin Park's second amended
18 complaint ("SAC") without prejudice. The order of dismissal (the "Dismissal Order") required
19 Park, if he thought he could amend, to file an *ex parte* application showing that he could do
20 so. Park has now moved for leave to amend, requesting oral argument. The motion also
21 requests leave to add a new plaintiff, Madelaine Ginsberg, a Florida resident.

22 The Court may, but is not required to hold oral argument. See Civil Local Rule
23 7.1(d0(1) and Chamber Standing Order, § 8. Here, it does not appear that oral argument is
24 necessary, and the Court will rule on the request without a hearing.

25 **Legal Standards**

26 Following dismissal of a complaint, leave to amend is ordinarily granted, but leave to
27 amend need not be granted if amendment would be futile or if the amended complaint would
28 not withstand a motion to dismiss. See *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298

1 (9th Cir. 1998). The Dismissal Order explained the defects in the SAC, and told Park what he
2 would need to do in order to amend successfully. If the proposed third amended complaint
3 ("TAC"), which is attached to Park's application, fails to remedy those defects, it would
4 appear he cannot do so.

5 When determining whether a complaint states a claim, the Court accepts all
6 allegations of material fact in the complaint as true and construes them in the light most
7 favorable to the non-moving party. *Cedars-Sinai Medical Center v. National League of*
8 *Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007) (citation omitted). But the Court is
9 "not required to accept as true conclusory allegations which are contradicted by documents
10 referred to in the complaint," and does "not . . . necessarily assume the truth of legal
11 conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox*
12 *Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (citations and quotation marks
13 omitted). Furthermore, conclusory allegations, unwarranted deductions, or unreasonable
14 inferences need not be accepted as true. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969,
15 973 (9th Cir. 2004).

16 Under Fed. R. Civ. P. 8(a)(2), only "a short and plain statement of the claim showing
17 that the pleader is entitled to relief," is required, in order to "give the defendant fair notice of
18 what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*,
19 550 U.S. 544, 554–55 (2007). "Factual allegations must be enough to raise a right to relief
20 above the speculative level" *Id.* at 555. "[S]ome threshold of plausibility must be crossed
21 at the outset" before a case is permitted to proceed. *Id.* at 558 (citation omitted). The
22 well-pleaded facts must do more than permit the Court to infer "the mere possibility of
23 conduct;" they must show that the pleader is entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662,
24 679 (2009).

25 Discussion

26 The heart of Park's claim is that he was tricked into enrolling online in a fee-based
27 membership program. While making a purchase on the Gamestop website, he was offered
28 a \$10.00 coupon good on his next Gamestop purchase. When he clicked on the coupon, a

1 new window opened and Park was asked to provide his email address, which he did. He
2 clicked on an “acceptance” button. He does not remember seeing any explanation that he
3 was enrolling in a membership program with Webloyalty.com. He did not provide his debit
4 card information to Webloyalty. Rather, Gamestop provided that information to Webloyalty
5 by means of the “data pass” process, which was later prohibited by the Restore Online
6 Shoppers' Confidence Act (ROSCA), 15 U.S.C. U.S.C. §§ 8401, *et seq.*, although it was legal
7 at the time the transaction was consummated. Park was charged \$12.00 per month from
8 June, 2010 until April, 2011, when he discovered the charges and obtained a partial refund.

9 The Court already ruled on many issues presented here, and the reasoning and
10 analysis of its earlier order of dismissal (Docket no. 37) is incorporated by reference into this
11 order. That reasoning is not repeated here, except as necessary for clarity.

12 **Proposed Amendments**

13 The TAC introduced only a few substantial amendments. One group of amendments
14 alleges that Park was not looking for, and did not see disclosures regarding the nature of the
15 transaction he was entering into. See TAC, ¶¶ 17–19. A second proposed amendment says
16 Park does not know what portion of his payments the \$48 refund represented, but he
17 assumes it was attributable to the entire period. *Id.*, ¶ 20. A third proposed amendment
18 alleges Park could not have discovered the first charge to his account until he received his
19 written bank statement in the mail, around July 5, 2009. *Id.*, ¶ 8. Several paragraphs also add
20 conclusory allegations that Webloyalty’s practices were known to be deceptive and to violate
21 the law. *Id.*, ¶¶ 16, 28, 33.

22 **Claims Arising from Alleged Deception Regarding the Nature of the Transaction**

23 Although Park identified a number of different statutes and theories, the essence of
24 most of his claims is that the nature of the transaction he was entering into with Webloyalty
25 was not properly or adequately disclosed, and that as a result he lost money.

26 At the outset, it is important to note that Park didn’t correct many of the defects the
27 Dismissal Order identified. For example, it refused to exclude from Park’s claims any portion
28 of the claims arising from the refunded money. The Ninth Circuit’s ruling in *Berry v.*

1 *Webloyalty* was clear that a refund of charges moots a claim like this. See 517 Fed. Appx.
2 581, 582 (9th Cir. 2013). Park alleges that the fact that the effects of being deprived of the
3 money (including inability to use the money advantageously) give rise to a cognizable injury.
4 But if that were the case, *Berry's* ruling would be meaningless, because all temporary
5 deprivations of money result in the inability to use that money. Instead of correcting those
6 defects, the motion accompanying Park's TAC argues the Court's order was wrong. To the
7 extent it does this, it amounts to an unauthorized motion for reconsideration. Park briefed the
8 motion to dismiss, and the Court considered those arguments. Motions for reconsideration
9 are disfavored, and are not the place for parties to make new arguments they did not
10 originally raise. *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir.2001); *Northwest*
11 *Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925–26 (9th Cir. 1988)). That is
12 particularly true here, where the Court did not authorize or invite a motion for reconsideration.
13 See Standing Order in Civil Cases, ¶ 4(j) ("No motion for reconsideration will be filed without
14 leave of Court.") The purpose of the Court's order was to ascertain whether successful
15 amendment was possible, or whether amendment would be futile.

16 The TAC depends heavily on conclusory allegations. This is most important with
17 respect to statements and disclosures that appeared on the web pages Park looked at, and
18 the import of those statements and disclosures. The TAC's allegations regarding the actual
19 statements and appearance of the web page are rather thin. Instead, it focuses more on
20 pointing out some of the page's statements and characterizing them as incomplete or
21 misleading.

22 The TAC also fails to expand on allegations the Dismissal Order pointed out were
23 insufficient. For instance, the TAC alleges that Park never noticed certain disclosures, did
24 not realize he had been enrolled in a membership plan, and did not notice his bank account
25 was being charged \$12.00 each month. It is true that these are necessary allegations; Park
26 may not claim he was deceived if he actually knew what he was agreeing to. But they are not
27 sufficient. Park must allege facts showing not only that he did not know these things, but also
28 that the disclosures provided to him were insufficient to put him on notice. Park's failure to

1 notice or read what was presented to him before he agreed to it does not mean he was
2 deceived.

3 Webloyalty earlier provided copies of the web pages it says Park would have viewed.
4 (Docket no. 28, Exs. A through E; *see also id.*, Ex. F (email Webloyalty represents was sent
5 to Park, informing him of the terms of the agreement).) While the Court did not assume the
6 authenticity of those exhibits, it did find them helpful, in illustrating the kinds of disclosures
7 Park could have been given (see Docket no. 37 at 7:24–8:2 (explaining the usefulness of the
8 exhibits), which would have sufficiently disclosed the nature of the transaction. (See *id.* at
9 5:19–7:14 (discussion of why disclosures were adequate).) To plead a claim, Park would
10 need to allege facts that, if true, show he is entitled to relief, not merely that he might be
11 entitled to relief. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (1979). When confronted with the
12 possibility that he was told multiple times he was enrolling in a membership program, Park
13 cannot simply remain silent or change the subject. He must plead facts showing he was not
14 told those things — or if he was, why the disclosures were ineffective. If the proffered web
15 pages are consistent with the complaint and yet adequately and properly disclose the nature
16 of the transaction, the complaint is inadequate. Park was told this, and the TAC should have
17 pleaded facts showing that those exhibits could not be authentic — or, in other words, that
18 he was not given the disclosures Webloyalty says he was given. In order to state a claim, the
19 complaint would need to exclude the possibility that those exhibits are what Webloyalty
20 claims they are. (See Docket no. 37 at 7:24–8:2.) The Court specifically pointed this out, and
21 told Park it needed to be addressed. (Order Dismissing SAC (Docket no. 37) at 6:18–23,
22 7:24–8:2, 9:15–23, 10:8–13, 12:12–20.)

23 Park concedes that the exhibits are (or at least could be) authentic. (Pl.’s Response
24 5:12–15.) In effect, he has conceded that he was provided with the disclosures Webloyalty
25 claims he was given, which the Court found would have been sufficient to put him on notice
26 of the nature of the transaction and to defeat all his claims. In large part, Park’s response

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1 simply disagrees with the Court's determination; as noted, the Court is not reconsidering its
2 earlier decision.

3 Park also argues that the "dynamic enrollment process" during which the disclosures
4 were made resulted in deception. (*Id.* at 3:6–14.) But the TAC relies on facts and arguments
5 the Court already considered. (See Docket no. 37 at 7:15–8:2 (rejecting as inadequate the
6 generalized allegation that context could have rendered disclosures inadequate)). He also
7 adds his own unwarranted conclusions about the effect of those allegations and asserts
8 Webloyalty had the intent to deceive. (See TAC, ¶¶ 10–16, 18.) In particular, paragraph 18
9 concludes that "[t]he webpage contained many prominent state[ment]s that Park was
10 receiving a thank you gift from Gamestop, not an offer to enroll in a membership program."
11 He then quotes statements he thinks show this. In fact, the statements cannot reasonably
12 be construed as Park does. The Court agrees that the quoted statements said Park was
13 receiving a \$10 coupon, but they say nothing at all to suggest that there were no other terms
14 Park needed to know, or that Park was not signing up for a membership program. The
15 prominent disclosures Park now concedes were made to him were adequate to inform him
16 of the nature of the transaction (*see, e.g.*, Docket no. 28-1, Ex.B (web page with disclosures
17 indicated)), and nothing in the statements he quotes contradicts any of this.

18 The disclosures Park agrees he was given were prominent, clear, made repeatedly,
19 and placed where they were likely to be seen by anyone signing up for the program. They
20 made clear he would be charged for the continuing membership, and disclosed that he was
21 dealing with an entity other than Gamestop, which undercuts his claim that he was harmed
22 by the use of the "data pass" process or that it was unfair to him. Although the Court's
23 previous order addressed all these points, it bears repeating that Park's allegation that he
24 did not notice or read them forms only part of a claim; it is not by itself sufficient to state a
25 claim. If the disclosures were made, and were adequate to put Park on notice of the nature
26 of the transaction — and the Court holds they were — the fact that he did not read or pay
27 attention to them does not give rise to a claim.

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1 Park repeats his argument that Congress thought Webloyalty's practices were
2 deceptive. He seeks discovery of documents produced to Congress in an effort to explore
3 this further. As the Court determined before, even if Congress had made such a conclusion,
4 it would not be binding on the Court in this case, nor would it render Webloyalty's practices
5 actionable. (See Docket no. 37 at 4:12–5:2.) Furthermore, the allegations make clear
6 Congress considered Webloyalty's actions over a long period of time, and in many different
7 contexts. There is no reason to suppose Congress knew anything about what happened to
8 Park, or that it had any opinion about whether he had been treated fairly. Congress may well
9 have thought Webloyalty's practices, over time and as a general matter, were unfair, without
10 knowing or taking into account any of the facts of his case. Park's allegations of scienter
11 likewise do not salvage his claim. Nor does Park's conclusory allegation that "Webloyalty
12 violated the rules the credit card companies had established for 'card-not-present'
13 transactions" (TAC, § 16) help him.

14 Because Park concedes Webloyalty made the disclosures it claimed to have made,
15 and because the Court has concluded that those disclosures adequately gave notice of the
16 nature of the transaction, Park has no claim against Webloyalty regardless of Webloyalty's
17 mental state at the time.

18 **Timeliness of Claims**

19 The first charge to Park's bank account was made on June 19, 2009. The order
20 dismissing the SAC pointed out that, under the Electronic Funds Transfer Act's one-year
21 limitations period, his claims were therefore time-barred as of June 20, 2010. Any tolling he
22 became entitled to after that time would not salvage his claim.

23 Park now alleges that he did not receive his bank statement in the mail until at least
24 July, 2009. Although it seems likely Park had access to an electronic statement before then,
25 bearing in mind that it is clear he has an email account and uses the internet, the Court
26 accepts his representation that he does not engage in online banking and had only a mailed
27 paper bank statement. That being said, it is still possible he had access to all material facts
28 on May 19, 2009, when he first viewed the enrollment page. (Order Dismissing SAC,

1 8:20–28.) At this stage, however, the Court accepts Park’s amendment and determines the
2 running of the statute of limitations is not apparent on the face of the complaint.

3 That being said, Park also seeks to add claims by Madelain Ginsberg, whose account
4 was first charged in April, 2009 — at least one month and possibly up to two months earlier
5 than Park’s — though she did not actually discover the charges until 2012. Even though
6 Park’s claims may not be time-barred, it appears Ginsberg’s are. Leave to amend to add
7 Ginsberg’s claims is being denied in any event, but the apparent time bar also supports
8 denial. The TAC merely alleges that Ginsberg did not notice the charges until three years
9 later, not that she could not reasonably have discovered them on her credit card statement
10 right away. (TAC, ¶¶ 23–24.) It alleges Webloyalty charged her credit card once after she told
11 them to stop, but that charge was removed, which moots any claim arising from it. (*Id.*, ¶ 25.)

12 **Discovery Request**

13 Park asks the Court for early discovery of documents Webloyalty produced to
14 Congress. As the Court’s earlier rulings and the discussion above make clear, Congress’
15 conclusions and the basis for those conclusions is not at issue here. Congress might well
16 have thought Webloyalty’s practices were bad and the law ought to be amended to prohibit
17 them. But that has no bearing on what disclosures were made to Park, or on this case. Early
18 discovery is **DENIED**.

19 **State Law Claims**

20 The complaint identified both the presence of a federal question and the Class Action
21 Fairness Act as giving rise to jurisdiction. The allegations merely say that the amount in
22 controversy exceeds \$5 million and there are "thousands" of putative class members. Now
23 that it is clear the federal claims cannot proceed, Park might still bring claims under California
24 and Connecticut law, but it is not clear what the value of those claims would be, and Park has
25 not attempted to show that those claims exceed \$5 million. Indeed, it is doubtful that they
26 would, considering that each of the "thousands" of putative class members was charged \$10
27 to \$12 per month. Accounting for time bars, members could not have lost no more than a few
28 hundred dollars each and many would have lost much less.

1 Webloyalty has its principal place of business in Connecticut, and Park has argued
2 that some of Connecticut's consumer protection laws give rise to claims. Park also alleges
3 Webloyalty has two offices in California, but does not allege what, if any, wrongful activity
4 was done there. Unless there is some California nexus, California law does not govern
5 transactions occurring entirely elsewhere, such as those between Webloyalty and putative
6 class members living in the 49 other states. Claims arising under California law are therefore
7 likely to represent only a fraction of all class claims. Even assuming the state law claims
8 survive, Park has not invoked the Court's jurisdiction over them.

9 But it does not appear the state law claims can survive. The order of dismissal
10 explained why they were being dismissed. (Docket no. 37 at 10:14–11:17.) Park now
11 disagrees with this, and argues that even if Webloyalty's practices not violate federal law,
12 they can still be unfair under state consumer protection law. He refers to this as the
13 "unfairness prong" analysis. While this is true, Park's general unfairness claims remain
14 inadequately pled. He has not pleaded facts showing that, although he was told all relevant
15 details about the transaction, it was nevertheless unfair to him. It is certainly possible this
16 type of transaction might have been unfair to other putative class members. But at this point,
17 the issue is whether Park has adequately pled his own claim; he must do that before he can
18 represent anyone else.

19 Because Park was cautioned about the facts he would need to plead, and has failed
20 to do so, it appears he cannot successfully amend. In cases "where the plaintiff has
21 previously been granted leave to amend and has subsequently failed to add the requisite
22 particularity to its claims, the district court's discretion to deny leave to amend is particularly
23 broad." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (internal
24 quotation marks omitted).

25 **Leave to Add Madelaine Ginsberg as Plaintiff**

26 In addition to the problem that Ginsberg's claims may be time-barred, her theories of
27 recovery fare no better than Park's, and for the same reasons. Furthermore, because she
28 is not a California resident she cannot represent either of the two California classes (even

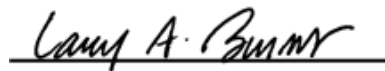
1 assuming there are any valid claims under California law). And finally, waiting until the case
2 was well over two years old and the complaint had been dismissed amounts to undue delay.
3 *See Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir. 2010) (explaining that undue delay and/or
4 futility are reasons to deny leave to amend). *See also Union Pacific R. R. Co. v. Nevada*
5 *Power Co.*, 950 F.2d 1429, 1432 (9th Cir. 1991) (explaining that, generally, leave to add
6 claims is granted more freely than leave to add parties).

7 **Conclusion and Order**

8 For the reasons set forth above, the Court finds Park cannot successfully amend. The
9 defects in his complaint were pointed out to him and he was directed to show that he could
10 remedy them, yet he has failed to do so. Leave to add Madeline Ginsberg would be futile
11 and, at this point, would amount to undue delay. The motion for leave to amend is **DENIED**
12 and this action is **DISMISSED**. It is **DISMISSED WITH PREJUDICE** as to Park's federal
13 claims, and **DISMISSED WITHOUT PREJUDICE** as to his state law claims and the putative
14 class's claims. Madeleine Ginsberg's claims are not yet part of this action (except insofar as
15 she may be part of the putative class), and so need not be dismissed specifically. But denial
16 of leave to add her as a plaintiff should not be construed as an adjudication of any of her
17 claims.

18 **IT IS SO ORDERED.**

19 DATED: June 19, 2015

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21 **HONORABLE LARRY ALAN BURNS**
22 United States District Judge
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